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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

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No. 78-216
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UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,
v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

—
SUPPLEMENTAL REPLY OF PETITIONER
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TABLE OF AUTHORITIES

CASES:	Page
<i>Bell Telephone Co. of Pennsylvania v. F.C.C.</i> , 503 F.2d 1250 (3d Cir. 1974)	3
<i>F.C.C. v. Pottsville Broadcasting Co.</i> , 309 U.S. 134 (1940)	4
<i>F.C.C. v. RCA Communications, Inc.</i> , 346 U.S. 86 (1953)	4
<i>FPC v. Idaho Power Co.</i> , 344 U.S. 17 (1920)	4
<i>MCI Telecommunications Corp. v. F.C.C.</i> , 496 F.2d 214 (3d Cir. 1974)	3
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 98 S.Ct. 1197 (1978)	5
 ADMINISTRATIVE AGENCY PROCEEDINGS:	
<i>Bell System Tariff Offerings</i> , 46 F.C.C. 2d 413 (1974), <i>aff'd. sub nom. Bell Telephone Company of Pennsylvania v. F.C.C.</i> , 503 F.2d 1250 (3d Cir. 1974), <i>cert. den.</i> , 422 U.S. 1026 (1975)	3
 MISCELLANEOUS:	
<i>Wright, The Courts, and the Rulemaking Process: The Limits of Judicial Review</i> , 59 Cornell Law Review 375 (1974)	5

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SUPPLEMENTAL REPLY OF PETITIONER

The United States Independent Telephone Association (USITA), petitioner in No. 78-216, hereby respectfully submits this brief reply to the "Brief in Opposition" filed by the Solicitor General of the United States and the Assistant Attorney General, Antitrust Division, U.S. Department of Justice.

In succinct summary, it appears to be the Antitrust Division's position that since in its view the court below reached the right result (*i.e.*, the court authorized new long distance telephone companies and required existing telephone companies to assist the new com-

petitors), whether the court below overstepped the bounds of judicial review, usurped agency functions, erred in construing statutes, or created conflict between circuits are matters of little moment and in any event do not warrant the attention of the Court.

The central point here, however, is not whether the Antitrust Division agrees with the result reached by the court below—and since that Division had unsuccessfully urged its views on the FCC in these matters before the Commission, its agreement with the decisions of the court below and its effort to shield those decisions from review and possible reversal come as no great surprise—but rather whether common carrier communications policy, common carrier communications authorizations, common carrier interconnection obligations, and common carrier regulatory procedures are to be determined by the administrative agency charged by the Congress with statutory responsibility for those determinations, or by the court below through judicial veto of Commission decisions.

Curiously, this central point is ignored in the document styled "Brief for the United States in Opposition." Rather than addressing the issue, the brief in opposition contents itself with the thrice repeated myopic assertions that "... we do not see how . . .," "we see no reason why . . .," and "[n]or do we see . . ."¹ any significant impact on the Commission's responsibility, on its pending proceedings, or on administrative or communications law.

With all due deference, it appears that the reason for these visual difficulties is a failure to look at the

¹ Brief in Opposition, p. 14.

real world results of the decisions below. Had the United States looked, it would have been compelled to concede that:

1. New long distance telephone companies are in operation *because the court below, not the Commission, authorized them*;
2. Existing telephone companies are now required to interconnect their facilities with the new companies *because the court below, not the Commission, ordered these interconnections*;
3. The deliberations and the decisions of the Third Circuit and the Commission² on the scope of telephone company interconnection obligations have been rendered meaningless, for *by order of the court below interconnection obligations are unlimited*;
4. The Commission has been required *by order of the court below, and without an affirmative public interest finding*, either administrative or judicial, to permit continued and expanded long distance telephone service competition for the duration of a proceeding having as its purpose whether that finding can be made.

The judicial activism exemplified by these facts is aptly described in the concluding sentence of the Brief in Opposition:

*"...the decision below is based, in the last analysis, on the court of appeals determination of what the Commission in fact decided. . ."*³ (Emphasis supplied).

² *MCI Telecommunications Corp. v. F.C.C.*, 496 F.2d 214, (3d Cir. 1974); *Bell System Tariff Offerings*, 46 F.C.C. 2d 413 (1974); *Bell Telephone Company of Pennsylvania v. F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), cert. den. 422 U.S. 1026 (1975).

³ Brief in Opposition, p. 14.

This is precisely the problem, for if one thing in these cases is unmistakably clear for all to see, the court of appeals determination of what the Commission decided is totally at odds on all counts with the Commission's decisions. The Commission decided that specialized carriers were not authorized to provide long distance telephone service. The court below found that they were. The Commission decided that the interconnection obligations of existing telephone companies were limited to private line services. The court below found these obligations unlimited.

Moreover, even if it be assumed, *arguendo*, that the Commission erred in its belief that its statute "prohibits competition by those whose entry does not satisfy the public interest standard,"⁴ i.e., that the Commission must first affirmatively find a public interest requirement *before authorizing entry*, the finding of that administrative error by the court below marked the bounds of judicial review.⁵

In short, it was for the Commission, not the court below, to determine whether competition in long distance telephone service satisfies the public interest standard. It was for the Commission, not the court below, to determine whether facility interconnection was necessary or desirable in the public interest. And it was for the Commission, not the court below, to decide how "it may best proceed to develop the needed evidence and how its prior decision should be modified in light

⁴ *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953).

⁵ See, e.g., *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

of such evidence as develops."⁶ But as the record here shows, none of these functions was left for the Commission to perform; all were usurped by the court below.

Thus has the error by the court below in its *Execunet I* decision⁷ now been grievously compounded by the decision in *Execunet II*.⁸ Given the circumstances, the fact that the United States agreed with the Commission that *Execunet I* did warrant review but the Antitrust Division now concludes that the decisions of the court below do not warrant review is a conclusion that defies logical or rational explanation.

As noted, however, it does appear that the Antitrust Division now finds the decisions below in accord with its philosophy of competition. We respectfully suggest that the Division's philosophy is entitled to little, if any, weight here, for the task of regulating communication common carriers has been assigned to the Commission, not the Division.

Moreover, it cannot be seriously argued that in the decisions below the court has observed the limits of judicial review.⁹ Rather, undisputedly evident is the fact that the court below has far overstepped the bounds, and has itself decided and ordered immediate

⁶ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 98 S.Ct. 1197 (1978).

⁷ *MCI Telecommunications Corp. v. F.C.C.*, 561 F.2d 365 (D.C. Cir. 1977), cert. den. 434 U.S. 1040 (1978).

⁸ Pet. App. D.

⁹ See, e.g., Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell Law Review 375, 396 (1974).

implementation of its own version of Federal communications policy and communications authorizations and requirements. These errors are of more than sufficient importance to warrant review by the Court.

For these reasons, together with the reasons stated in USITA's petition and in its reply to earlier filed oppositions, certiorari should be granted.

Respectfully submitted,

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